

prospective common shareholder or third-party information provider;

(b) Each Fund will issue, contemporaneously with the issuance of any 19(a) Notice, a press release containing the information in the 19(a) Notice and file with the Commission the information contained in such 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, as an exhibit to its next filed Form N-CSR; and

(c) Each Fund will post prominently a statement on its (or the Investment Adviser's) Web site containing the information in each 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, and will maintain such information on such Web site for at least 24 months.

#### 4. Delivery of 19(a) Notices to Beneficial Owners

If a broker, dealer, bank or other person ("financial intermediary") holds common shares issued by a Fund in nominee name, or otherwise, on behalf of a beneficial owner, the Fund: (a) Will request that the financial intermediary, or its agent, forward the 19(a) Notice to all beneficial owners of the Fund's shares held through such financial intermediary; (b) will provide, in a timely manner, to the financial intermediary, or its agent, enough copies of the 19(a) Notice assembled in the form and at the place that the financial intermediary, or its agent, reasonably requests to facilitate the financial intermediary's sending of the 19(a) Notice to each beneficial owner of the Fund's shares; and (c) upon the request of any financial intermediary, or its agent, that receives copies of the 19(a) Notice, will pay the financial intermediary, or its agent, the reasonable expenses of sending the 19(a) Notice to such beneficial owners.

#### 5. Additional Board Determinations for Funds Whose Shares Trade at a Premium

If:

(a) A Fund's common shares have traded on the stock exchange that they primarily trade on at the time in question at an average premium to NAV equal to or greater than 10%, as determined on the basis of the average of the discount or premium to NAV of the Fund's common shares as of the close of each trading day over a 12-week rolling period (each such 12-week rolling period ending on the last trading day of each week); and

(b) A Fund's annualized distribution rate for such 12-week rolling period, expressed as a percentage of NAV as of the ending date of such 12-week rolling

period is greater than the Fund's average annual total return in relation to the change in NAV over the 2-year period ending on the last day of such 12-week rolling period;

then:

(i) At the earlier of the next regularly scheduled meeting or within four months of the last day of such 12-week rolling period, the Board including a majority of the Independent Trustees:

(1) Will request and evaluate, and the Investment Adviser will furnish, such information as may be reasonably necessary to make an informed determination of whether the Plan should be continued or continued after amendment;

(2) Will determine whether continuation, or continuation after amendment, of the Plan is consistent with the Fund's investment objective(s) and policies and is in the best interests of the Fund and its shareholders, after considering the information in condition 5(b)(i)(1) above; including, without limitation:

(A) Whether the Plan is accomplishing its purpose(s);

(B) The reasonably foreseeable material effects of the Plan on the Fund's long-term total return in relation to the market price and NAV of the Fund's common shares; and

(C) The Fund's current distribution rate, as described in condition 5(b) above, compared with the Fund's average annual taxable income or total return over the 2-year period, as described in condition 5(b), or such longer period as the Board deems appropriate; and

(3) Based upon that determination, will approve or disapprove the continuation, or continuation after amendment, of the Plan; and

(ii) The Board will record the information considered by it, including its consideration of the factors listed in condition 5(b)(i)(2) above, and the basis for its approval or disapproval of the continuation, or continuation after amendment, of the Plan in its meeting minutes, which must be made and preserved for a period of not less than six years from the date of such meeting, the first two years in an easily accessible place.

#### 6. Public Offerings

A Fund will not make a public offering of the Fund's common shares other than:

(a) A rights offering below NAV to holders of the Fund's common shares;

(b) An offering in connection with a dividend reinvestment plan merger, consolidation, acquisition, spin off or reorganization of the Fund; or

(c) An offering other than an offering described in conditions 6(a) and 6(b) above, provided that, with respect to such other offering:

(i) The Fund's annualized distribution rate for the six months ending on the last day of the month ended immediately prior to the most recent distribution record date,<sup>5</sup> expressed as a percentage of NAV per share as of such date, is no more than 1 percentage point greater than the Fund's average annual total return for the 5-year period ending on such date;<sup>6</sup> and

(ii) The transmittal letter accompanying any registration statement filed with the Commission in connection with such offering discloses that the Fund has received an order under section 19(b) to permit it to make periodic distributions of long-term capital gains with respect to its common stock as frequently as twelve times each year, and as frequently as distributions are specified by or determined in accordance with the terms of any outstanding preferred shares as such Fund may issue.

#### 7. Amendments to Rule 19b-1

The requested order will expire on the effective date of any amendments to rule 19b-1 that provide relief permitting certain closed-end investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common shares as frequently as twelve times each year.

For the Commission, by the Division of Investment Management, under delegated authority.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-21923 Filed 9-10-09; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28895; File No. 812-13535]

### American Capital, Ltd.; Notice of Application

September 3, 2009.

**AGENCY:** Securities and Exchange Commission (the "Commission").

**ACTION:** Notice of an application for an order under section 61(a)(3)(B) of the

<sup>5</sup> If the Fund has been in operation fewer than six months, the measured period will begin immediately following the Fund's first public offering.

<sup>6</sup> If the Fund has been in operation fewer than five years, the measured period will begin immediately following the Fund's first public offering.

Investment Company Act of 1940 (the "Act").

**SUMMARY OF APPLICATION:** Applicant, American Capital, Ltd. (f/k/a American Capital Strategies, Ltd.) requests an order approving a proposal to grant certain stock options to directors who are not also employees or officers of the applicant (the "Non-employee Directors") under its 2008 Stock Option Plan (the "Plan").

**DATES: Filing Dates:** The application was filed on May 28, 2008 and amended on November 21, 2008, July 21, 2009, and August 28, 2009.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on September 29, 2009, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090; Applicant, 2 Bethesda Metro Center, 14th Floor, Bethesda, Maryland 20814.

**FOR FURTHER INFORMATION CONTACT:** Laura J. Riegel, Senior Counsel, at (202) 551-6873, or Marilyn Mann, Branch Chief, at (202) 551-6821 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at <http://www.sec.gov/search/search.htm>, or by calling (202) 551-8090.

### Applicant's Representations

1. Applicant, a Delaware corporation, is a business development company ("BDC") within the meaning of section 2(a)(48) of the Act.<sup>1</sup> Applicant's primary

<sup>1</sup> Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial

business objectives are to increase its net operating income and net asset value by investing its assets in senior debt, subordinated debt, with and without detachable warrants, and equity of small to medium sized businesses with attractive current yields and potential for equity appreciation. Applicant's investment decisions are made either by its board of directors (the "Board"), based on recommendations of the executive officers of applicant, or, for investments that meet certain objective criteria established by the Board, by the executive officers of applicant, under authority delegated by the Board. Applicant does not have an external investment adviser within the meaning of section 2(a)(20) of the Act.

2. Applicant requests an order under section 61(a)(3)(B) of the Act approving its proposal to grant certain stock options under the Plan to its Non-employee Directors.<sup>2</sup> Applicant has a nine member Board with one current vacancy. Seven of the eight current members of the Board are not "interested persons" (as defined in section 2(a)(19) of the Act) of the applicant ("Disinterested Directors"). All of the current Non-employee Directors are Disinterested Directors. The Board approved the Plan at a meeting of the Board held on March 13, 2008 and applicant's stockholders approved the Plan at the annual meeting of stockholders held on May 19, 2008.<sup>3</sup>

3. Applicant's officers, employees, and Non-employee Directors are eligible to receive options under the Plan. Under the Plan, a maximum of 750,000 shares of applicant's common stock, in the aggregate, may be issued to Non-employee Directors and 93,750 shares of applicant's common stock may be issued to any one Non-employee Director. On the date that the Commission issues an order on the application ("Order Date"), each of the seven Non-employee Directors serving

assistance with respect to the issuers of such securities.

<sup>2</sup> The Non-employee Directors receive a \$100,000 per year retainer payment and \$3,000 for each Board or committee meeting or other designated Board-related meeting attended, and reimbursement for related expenses. Non-employee Directors who chair a committee of the Board receive an additional \$10,000 retainer per year. Non-employee Directors who serve as directors on the boards of portfolio companies also receive an annual retainer from applicant set at \$30,000 per board, in lieu of any payment from the portfolio company.

<sup>3</sup> At Board meetings held on November 13, 2008 and July 9, 2009, the Board approved amendments to the Plan. At each meeting, the Board determined that the applicable amendments did not require stockholder approval under Section 10 of the Plan or applicable law or NASDAQ listing requirements. Applicant acknowledges that the Commission is not taking a position as to whether applicant is required to seek stockholder approval for the amendments.

on the Board as of May 19, 2008 will be granted options to purchase 93,750 shares of applicant's common stock (the "Initial Grants"), provided that the Non-employee Director is a member of the Board on the Order Date. The options issued under the Initial Grants will vest in three equal parts, the first part on the Order Date and the remaining two parts on May 19, 2010 and May 19, 2011. Any person who becomes a Non-employee Director after May 19, 2008 will be entitled to receive options to purchase 93,750 shares of applicant's common stock (the "Other Grants"), if and to the extent that there are options available for grant to Non-employee Directors under the Plan. Each Other Grant will be effective on the later of the date such person becomes a Non-employee Director and the Order Date. The options issued under the Other Grants will vest in three equal parts on each of the first three anniversaries of the date such person becomes a Non-employee Director.

4. Under the terms of the Plan, the exercise price of an option will not be less than 100% of the current market value, or if no such market value exists, the current net asset value ("NAV") per share of applicant's common stock on the date of the issuance of the option ("Fair Market Value").<sup>4</sup> The Initial Grants will expire on May 19, 2018, and the Other Grants will expire on the tenth anniversary of the date the person becomes a Non-employee Director. Options granted under the Plan may not be assigned or transferred other than by will or the laws of descent and distribution. In the event of the death or disability of a Non-employee Director during such director's service, all such director's unexercised options will immediately become exercisable and may be exercised for a period of three years following the date of death (by such director's personal representative) or one year following the date of disability, but in no event after the respective expiration dates of such options. In the event of the termination of a Non-employee Director for cause,

<sup>4</sup> Under the Plan, "Fair Market Value" is defined as follows: (a) If the common stock is listed on any established exchange or traded on the NASDAQ Global Select Market, the closing sales price of applicant's common stock as quoted on such exchange or market (or if the common stock is traded on multiple exchanges or markets, the exchange or market with the greatest volume of trading in the common stock) on the date on which an option is granted under the Plan, as reported in *The Wall Street Journal* or such other source as the Board deems reliable; or (b) in the absence of closing sales prices on such exchanges or markets for the common stock, the Fair Market Value will be determined in good faith by the Board, but in no event shall be less than the current NAV per share of common stock.

any unexercised options will terminate immediately. If a Non-employee Director's service is terminated for any reason other than by death, disability, or for cause, the options may be exercised within one year immediately following the date of termination, but in no event later than the expiration date of such options.

5. Applicant's officers and employees are eligible or have been eligible to receive options under stock option plans that exclude Non-employee Directors as participants (the "Employee Plans"), applicant's 2006 stock option plan (the "2006 Option Plan"), applicant's 2007 stock option plan (the "2007 Option Plan"), and applicant's 2009 stock option plan (the "2009 Option Plan"). Non-employee Directors have been eligible to receive options under applicant's two Disinterested Director stock option plans (the "Disinterested Director Plans"), the 2006 Option Plan and the 2007 Option Plan (collectively, the 2009 Option Plan, the 2007 Option Plan, the 2006 Option Plan, the Disinterested Director Plans and the Employee Plans are the "Other Plans"). As of June 30, 2009, applicant had 224,493,289 shares of common stock outstanding.<sup>5</sup> The 750,000 shares of applicant's common stock that may be issued to Non-employee Directors under the Plan represent 0.3% of applicant's outstanding voting securities as of June 30, 2009. As of June 30, 2009, the amount of voting securities that would result from the exercise of all outstanding options issued to applicant's directors, officers, and employees under the Other Plans and the Plan would be 37,107,027 shares of applicant's common stock, or 16.5% of applicant's outstanding voting securities. As of June 30, 2009, applicant had no outstanding warrants, options, or rights to purchase its voting securities other than the outstanding options issued to applicant's directors, officers, and employees under the Other Plans and the Plan.

#### **Applicant's Legal Analysis**

1. Section 61(3) of the Act permits a BDC to sell its common stock at a price below current NAV upon the exercise of any option issued in accordance with section 61(a)(3). Section 61(a)(3)(B) provides, in pertinent part, that a BDC may issue to its non-employee directors options to purchase its voting securities pursuant to an executive compensation plan, provided that: (a) The options expire by their terms within ten years; (b) the exercise price of the options is

not less than the current market value of the underlying securities at the date of the issuance of the options, or if no market value exists, the current NAV of the voting securities; (c) the proposal to issue the options is authorized by the BDC's shareholders, and is approved by order of the Commission upon application; (d) the options are not transferable except for disposition by gift, will or intestacy; (e) no investment adviser of the BDC receives any compensation described in section 205(a)(1) of the Investment Advisers Act of 1940, except to the extent permitted by clause (b)(1) or (b)(2) of that section; and (f) the BDC does not have a profit-sharing plan as described in section 57(n) of the Act.

2. In addition, section 61(a)(3) provides that the amount of the BDC's voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance may not exceed 25% of the BDC's outstanding voting securities, except that if the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights issued to the BDC's directors, officers, and employees pursuant to any executive compensation plan would exceed 15% of the BDC's outstanding voting securities, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance will not exceed 20% of the outstanding voting securities of the BDC.

3. Applicant represents that its proposal to grant certain stock options to Non-employee Directors under the Plan meets all the requirements of section 61(a)(3)(B). Applicant states that the Board is actively involved in the oversight of applicant's affairs and that it relies extensively on the judgment and experience of its Board. In addition to their duties as Board members generally, applicant states that the Non-employee Directors provide guidance and advice on operational issues, underwriting policies, credit policies, asset valuation and strategic direction, as well as serving on committees. Applicant believes that the availability of options under the Plan will provide significant at-risk incentives to Non-employee Directors to remain on the Board and devote their best efforts to ensure applicant's success. Applicant states that the options will provide a means for the Non-employee Directors to increase their ownership interests in applicant, thereby ensuring close identification of their interests with those of applicant and its stockholders. Applicant asserts that by providing

incentives such as options, applicant will be better able to maintain continuity in the Board's membership and to attract and retain the highly experienced, successful and dedicated business and professional people who are critical to applicant's success as a BDC.

4. As noted above, applicant states that the amount of voting securities that would result from the exercise of all outstanding options issued to applicant's directors, officers, and employees under the Other Plans and the Plan would be 37,107,027 shares of applicant's common stock, or 16.5% of applicant's outstanding voting securities, as of June 30, 2009. However, applicant represents that the maximum number of voting securities that would result from the exercise of all outstanding options issued and all options issuable to applicant's directors, officers, and employees under the Plan and the Other Plans would be 56,902,620 shares of applicant's common stock, or 25.3% of applicant's outstanding voting securities, as of June 30, 2009. Applicant states that to the extent the number of shares of common stock that would be issued upon the exercise of options issued under the Other Plans and the Plan exceeds 15% of applicant's outstanding voting securities, applicant will comply with the 20% limit in section 61(a)(3) of the Act.

5. Applicant asserts that, given the relatively small amount of common stock issuable to Non-employee Directors upon their exercise of options under the Plan, the exercise of such options would not, absent extraordinary circumstances, have a substantial dilutive effect on the NAV of applicant's common stock.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-21889 Filed 9-10-09; 8:45 am]

**BILLING CODE 8010-01-P**

<sup>5</sup> Applicant's common stock constitutes the only voting security of applicant currently outstanding.